

***United States Court of Appeals
for the Second Circuit***



APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA,
Appellee,

-v-

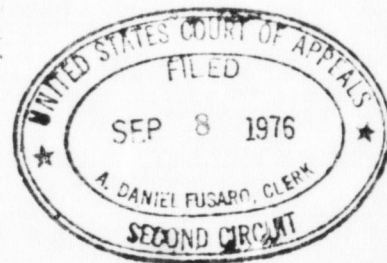
MICHAEL GARDNER,
Appellant.
-----x

3
245
76-1339

APPENDIX TO BRIEF FOR
APPELLANT MICHAEL GARDNER

Appeal from A Judgment of
Conviction in The United
States District Court For
The Southern District of
New York

VOLUME I



Donald E. Nawi, Esq.
2 Park Avenue
New York, New York 10016
Attorney for Appellant
Michael Gardner

PAGINATION AS IN ORIGINAL COPY

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BEST COPY AVAILABLE

A-1

Felony ☒ JUDGE/MAGISTRATE 0851 Assigned Trial
 Minor Offense ☐ 0208 1 District Office
 Other Misdemeanor ☐

U.S. vs. GARDNER, MICHAEL S., a/k/a
 Michael Gardner, a/k/a S.M. Gardner

09 01 76 002
 No. 03
 defendant

CHARGES	U.S. CODE SECTION	OFFENSES	COUNTS
18:2314		Transp. of stolen securities.	1&10
18:1341		Mail fraud.	2,5-7
18:1343		Wire fraud.	3,4,8
			9,11&12
18:1342		Use of fictitious name.	13

MAGR. CASE NO.
☐ Denied ☐ Pers.
☐ AMT ☐ Unse.
☐ Set (000) ☐ Condition
☐ date
☐ Bail Not Made
☐ Bail Status Changed (See Docket)

ATTORNEYS

Jed S. Rakoff
 (212) 791-0011

Irwin Klein
 2 Park Avenue - Suite 2701, NYC 10016
 NY 3-0054

II
KEY
INTERVIEWS
& DATES

INDICTMENT ☐ ARRAIGNMENT ☒ TRIAL ☐

Trial Set For 4-26-76
 Trial Began 4-26-76
 Trial Ended 5-26-76

Disposition 7-
☒ Convicted
☐ Acquitted
☐ Dismissed
☐ Noted/Dis.

III.
MAGISTRATE

Search Warrant	Issued	DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL/No.	OUTCOME
Summons	Return			PRELIMINARY EXAMINATION OR REMOVAL HEARING <input type="checkbox"/> Waived <input type="checkbox"/> Not Waived <input type="checkbox"/> Intervening Indictment		<input type="checkbox"/> Dismissed <input type="checkbox"/> Held for District GJ <input type="checkbox"/> Held to Answer to U. S. District
	Served					
Arrest Warrant				Tape No.	INITIAL/No.	Magistrate's Initials
COMPLAINT						
OFFENSE (In Complaint)						

IV.
MAGISTRATE
& DISTRICT
COURT
DOCKET
ENTRIES

Show last names and suffix numbers of other defendants on same indictment/information
 Braunig-2; Guthrie-3.

DATE	PROCEEDINGS	V. Exclud.
		(a) (b)
1-9-76	Filed indictment. Referred to Judge Pierce as superseding indictment 75 Cr 741.	
1-15-76	Filed affdvt of E. Neal Kaplan for a writ of habeas corpus - Writ issued to Warden, Federal Correctional Institute, Danbury, Connecticut Ret. 1-21-76.	
1-19-76	Filed Gov'ts/ Response to motion of co-def. Braunig respecting visits to Cft. Gardner.	
1-21-76	Filed Statement of Facts & Notice of Motion for an order pursuant to the "plan for achieving prompt disposition of criminal cases" dismissing indictment, & dismissing indictment based on prosecutorial misconduct.	
1-21-76	Filed Gov'ts Bill of Particulars.	
1-22-76	GARDNER (Def. Shirley Fisher) Dft. plead not guilty to 2nd superseding indictment. Court Exp. 1 ordered sealed by the Court. Same bail condition cont'd. Writ adjourned as to dft. Gardner to 2/1/76. Court 1-26-76 at 9:30... Pierce J	
1-22-76	Filed Sealed Envelope - Court Exhibit 1 Ordered sealed by Court. (Placed in the Sealer's Vault)	

(Continued)

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC §3161(h) - "SPEEDY TRIAL ACT".

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
1-23-76	Filed affdvt. & notice of motion for an order dismissing Cts. 3 and 6 of the indictment.				
1-27-76	Filed the following papers rec'd from Magistrate Alsop of the U.S. District Court, Salt Lake City Utah with a letter dtd. 1-19-76. Re: Witness Assen Ivanoff As Material Witness) Bail Reform Act Form No. 2 Appearance bond in the sum of \$50,000 by Assen Ivanoff from the District of Utah Doel at Sheet Entry - Central District of Utah (Mag. 4A-76 -711.				
1-27-76	ALL DEFTS. - Filed Order Specifying Methods & Conditions of Release of Assen D. Ivanoff, A Material Witness. Ordered that Assen D. Ivanoff, appear on 4-26-76 in room 1106 at 9:30 am; etc. in order to secure said appearance the material witness Assen D. Ivanoff be detained & committed to the custody of the U.S. Marshal for SDNY unless by no later than the close of business on 2-10-76 he comply with & satisfy each & every one of the special conditions; & he execute before a Judge, Magistrate, etc. a PFF in the sum of \$100,000 etc. & that he deposit with Clerk's further security for said bond the sum of \$1,000 cash, 75% of which may be taken from the \$500 previously deposited by said Assen D. Ivanoff with the US Dist. Court for the Dist. of Utah & transferred by said court to the Clerk of this court. & upon having complied with each & every one of the aforementioned special conditions, etc. forthwith return him his passport. Clerks. D. (mailed notice)				
1-27-76	Filed Appearance Bond for Assen D. Ivanoff (material witness) in the Sum of \$1,000. Cash. Rec'd from \$500.00 as security. - Clerk's. from District of Utah (\$500.00)				
2-5-76	Filed affidavit and notice of motion for an order granting a suppression hearing on all items obtained in violation of deft's Atty.-Client privilege & 5th Amendment Rights.				
2-5-76	Filed Affidavit by Stanley H. Fischer in support of Defts. application to dismiss the indictment.				
2-9-76	Filed Gov'ts. affidavit and notice of motion for an order pur. to Rule 16(b) FRCP. requiring each deft. to permit the Gov't, to inspect & copy, etc. all books, etc. which are in the possession, etc. of defts. or their attys. & any results or reports of physical or mental examination etc. & an order requiring defts. Gardner & Braunig to appear on 2-25-76 in the US Atty. Office and execute & furnish as indicated.				
2-17-76	One Sealed envelope - Court Exhibit #2 Order Sealed by Clerk of the Court.				
2-17-76	Filed Warrant to Apprehend Material Witness Assen Ivanoff with marshals return executed on 1-14-76.				
2-18-76	Filed affidavit and notice of motion for an ex parte proceeding pur. to Rule 17(b) FRCP.				
2-17-76	Filed Order that the Court directs that the letter marked as Court's Exhibit 2 & made a part of record be sealed. PierceJ. (mailed notice)				
(Continued)					
		(a)	(b)	(c)	(d)
		Interval (per Section II)	Start Date End Date	Ltr. Code	Tote Days

76 Cr. 21

GARDNER, MICHAEL S., a/k/a MICHAEL GARDNER, a/k/a S.M. GARDNER

DET.01

DATE	PROCEEDINGS
	Page #3 Pierce J.
2-25-76	Filed affdvt. by Martin E. Hecht. Re: Contact Mr. Herb Kadison C.P.A. to prepare deft. & Miss Susan Braunig tax returns for Mr. Gardner.
3-3-76	Filed Order that Gov't has moved for an order requiring defts. M S. Gardner & Susan M. Braunig to furnish handwriting exemplars. In the absence of such a showing as indicated, The Gov'ts. request for further handwriting exemplars is denied.....Pierce J. (mailed notice)
3-3-76	Filed Transcript of proceeding dtd. 1-22-76.
3-3-76	Filed Transcript of proceeding dtd. 1-26-76
03-05-76	Filed Writ of Habeas Corpus directed to Warden, Federal Correctional Center Danbury, Connecticut with marshals ret. - Writ Adjourned to 2-26-76 Pierce J. Writ Satisfied - 3-1-76 Pollack J.
03-17-76	Filed Gov'ts. affidavit to apprise the Court of the failure of deft. Gardner to furnish handwriting exemplars as directed by the Court.
03-17-76	Filed One Sealed Envelope - enclosed sealed affidavit. It shall not be opened without an order of the undersigned or another judge of this court. Placed in the Vault.....Pierce J.
3-17-76	Filed Order that Dft. Gardner furnish, forthwith, to Special Agent Thomas Myers of the Federal Bureau of Investigation & in the presence of Dfts. Counsel, such handwriting exemplars as required by Gov't., upon pain of being held in contempt & being liable for punishment, if such order not complied with before the deft. is removed from the MCC, but in no event, later than 5:00 P.M. March 19, 1976..Pierce J. (mailed notice)
3-18-76	Filed Memo. End. on Defts. Affidavit & application to furnish add'l handwriting exemplars. Motion denied....Pierce J. (mailed notice)
3-18-76	Filed Defts. Affidavit & application to furnish add'l handwriting exemplars & appointment of counsel for filing a civil action by deft.
03-31-76	Filed Gov'ts Memorandum in opposition to motions to suppress Grand Jury Testimony & to other recent submissions by the dfts.
03-31-76	Filed Gov'ts. Memorandum in opposition to dfts. latest Pre Trial motions.
03-31-76	Filed Gov'ts/ Memorandum of Law.
04-09-76	Filed Memo. End. on motion dtd. 3-9-76/Gov'ts. request requiring dfts. to permit certain discovery granted as requested. Etc.....Pierce J. (mailed notice)
04-09-76	Filed Defts. Memorandum of Law - An Examination of Dfts. Records violates dfts. 5th Amendments rights.
04-12-76	Filed Gov'ts. affdvt. for W/H.C Ad Pros - Writ Issued Ret. 4-22-76.
04-14-76	Filed Opinion #44235- Decision on the dfts. application is reserved pending receipt of further materials as set forth in this opinion as indicated....Pierce J. (mailed notice)

(Cont'd)

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GARDNER, ROBERT J. & MICHAEL GARDNER,

Page #4

DATE	PROCEEDINGS
4-15-76	Writ Issued (James E. Lofland) Ret. 4/26/76.
4-15-76	Filed Order the Gov't is directed to take all steps necessary to have James Lofland produced for trial of this action by 4/21/76, if feasible, but in no event later than 4/26/76.....Pierce J. (mailed notice)
4-20-76	Filed Memo. End. on motion dtd. 3-5-76. The Dft. Gardner's motion to dismiss count 1 of the indictment is denied.....Pierce J. (mailed notice)
4-20-76	Filed Memo. End. on motion dtd. 1-23-76. The Dft. Gardner's motion to dismiss counts 5 & 6 is denied.....Pierce J.
04-21-76	Filed Gov'ts Request to Charge.
04-21-76	Filed Dfts. Supplemental affdvt. in support of motion made 3/1/76 to suppress Grand Jury testimony of dfts. Guthrie & to dismiss ct. 14.
04-21-76	Filed Dft. Gardner Notice of Motion for order permitting deposition of co-dft. Susan M. Braunig.
04-20-76	Filed Gov'ts Memorandum in response to motion of dft. Gardner to take the deposition of MS. Braunig our to rule 15, FRCP.
04-22-76	Filed Opinion #44283 In accordance with the conditions & specifications set forth in this opinion, the dft. Gardner's motion to be permitted to take the deposition of Braunig is hereby granted. Pierce J. (mailed notice)
04-23-76	Filed Opinion # 44293. Motion to sever Ct. 14 as to dft. Guthrie is granted. Decision is reserved at this time as to dft. Guthrie motion to dismiss Ct. 14 as indicated. Guthrie's motion to strike introduction to Cts. 1 through 13 & to sever trial as indicted are denied, as indicated. Decision is reserved to preclude the gov't from impeaching his credibility as indicated. Etc.....Pierce J.
4-27-76	Filed Memo. End. on motion dtd. 1-21-76. Motion to dismiss, both on the ground of failure to comply with the "six month" rule & the ground of prosecutorial misconduct is hereby denied....Pierce J. (mailed notice)
04-28-76	Filed Gov'ts Memorandum of Law in support of its offer of Proof of Similar Acts & False Exculpatory Statements.
04-28-76	Filed Gov'ts Memorandum in support of an offer of Proof concerning the testimony of L. Ross Allen.
04-28-76	Filed Gov'ts. Appendix of Exhibits concerning the similar Acts outlined in its memorandum of law.
04-28-76	Filed Gov'ts Proposed Examination of Prospective Jurors.
04-29-76	Filed Memo. End. on motion dtd. 2-5-76. Motion to suppress & for a hearing is denied, in all respects.....Pierce J. (mailed notice)
5-10-76	Filed Dfts. Affidavit for production of William J. Winning Asat. US. Atty. for the Eastern District of Pennsylvania as indicated.

DATE	PROCEEDINGS
	Page #5
5-10-76	Filed Memo. End. on Motion dtd. 4-21-76. Motion is denied as stated on the record during the trial.....Pierce J. (mailed notice)
5-13-76	File Gov't responding affidvt. to affidavit of Daniel J. Steinbock dtd. 4/20/76 in support of Guthrie's motion to suppress his Grand Jury testimony & dismiss 14 of the present indictment.
5-21-76	Filed Gov't's Supplementary requests to charge.
4-19-76	Pre Trial Conference heldPierce J.
4-26-76	Trial begun with a Jury. Count 14 is severed. Dft. Braunig is severed on motion of her atty. Wm. Ellis.
4-27-76	Trial Cont'd.
4-28-76	Trial Cont'd.
4-29-76	Trial Cont'd.
4-30-76	Trial Cont'd.
5-3-76	Trial Cont'd.
5-4-76	Trial Cont'd.
5-5-76	Trial Cont'd.
5-6-76	Trial Cont'd.
5-7-76	Trial Cont'd.
5-10-76	Trial Cont'd.
5-11-76	Trial Cont'd.
5-12-76	Trial Cont'd.
5-13-76	Trial Cont'd.
5-14-76	Trial Cont'd.
5-17-76	Trial Cont'd.
5-18-76	Trial Cont'd.
5-19-76	Trial Cont'd.
5-20-76	Trial Cont'd.
5-21-76	Trial Cont'd.
5-21-76	Trial Cont'd. - Motions to dismiss held - all motions denied. (Jury not present that day)
5-24-76	Trial Cont'd. - deliberation begun.
5-25-76	Deliberations Cont'd.
5-26-76	Jury verdict reached. Jury finds dft. Gardner Guilty on each of Cts. 1 thru 13. Sentence as to Gardner July 7, 1966 at 4:30 P.M. Cont'd Remanded pending sentence.Pierce J.
6-3-76	Filed Memo. End. on Index of witnesses. The papers within, filed by the dft. Gardner in connection with his motion to subpoena witnesses at Gov't expenses pur. to Rule 17(b) FRCP are to be docketed & filed as part of the record in this case.....Pierce J. (mailed notice)
6-23-76	Filed CJA 21 Copy 2 approving payment to Paul A. Osborn, 233 Bway, NYC 10007.
6-23-76	Filed CJA 21 Copy 3 appointing counsel for dft. Paul A. Osborn, 233 Bway, NYC 10007
7-2-76	Filed transcript of proceedings dated 4-19-76
7-2-76	Filed transcript of proceedings dated 4-26, 27, 28, 29, 30 & 5-3-76.
7-2-76	Filed transcript of proceedings dated 5-4, 5, 6, 7, 10-76
7-2-76	Filed transcript of proceedings dated 5-11, 12, 13, 14, 15, 16-76
7-2-76	Filed transcript of proceedings dated 5-18, 19, 20, 21, 24, 25, 26-76
07-08-76	Filed Dfts. Motion for an order vacating & setting aside jury's verdict of Guilty & for judgment of acquittal.

DATE	PROCEEDINGS
7-8-76	Filed Memo. End. on motion dtd. 7-8-76. Dfts. Motion is denied in all respects...Pierce J. (mailed notice)
7-9-76	Filed Gov'ts Memorandum in opposition to dfts. motion for judgment of acquital.
7-7-76	Filed Judgment & Commitment (Atty. Stanley Fischer Present) Dft. having been produced habeas corpus ad prosequendum. The Dft. is hereby committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of FIVE(5) YEARS on each of counts 1 through 12 inclusive to run concurrently with each other. ONE (1) YEAR on count 13 to run concurrently with sentence imposed on counts 1 thru 12. The sentence on each of these counts 1 through 13, is to run concurrently with the sentence imposed on the indictment upon which the dft. was convicted in the Northern District of Illinois..Court declines to give credit for time served in any institution prior to this date other than for the time served in connection with the Northern District of Illinois sentence. The Court orders commitment to the custody of the Atty. Gen. & recommends that dft. not be confined in Danbury Correctional Facility.....Pierce J. Issued Commitment 7-14-76.
7-14-76	Filed Writ of H/C Ad Testificandum to have the body of James E. Lofland produced. Pierce J.
7-16-76	Filed Dfts. Notice of Appeal from judgment dtd. 7-7-76. (mailed notice)
8-9-76	Filed Order that the judgment of conviction is modified to provide that dft. receive credit with respect to this indictment for time served since 5/26/76, the date on which he was remanded following the jury's verdict of guilty with respect to this indictment...Pierce J.
8-3-76	Filed Transcript of proceedings, dtd. 7/7/76.
8-3-76	Filed Notice of Certification of Record to the UACA.
8-17-76	Filed True Copy of J&C & marshals ret. - Rec'd copy of J&C & executed by forwarding copy to Warden, MCC, NY
8-17-76	Filed Writ of H/C Ad Prosequendum. Writ Adjourned to 7/7/76 Writ Satisfied.
8-6-76	Filed Modified Judgment & Commitment Ordered that the Dft. is hereby committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of FIVE (5) Years on each of counts 1 through 12 inclusive to run concurrently with each other. ONE (1) YEAR on count 13 to run concurrently with sentence on each of these counts, 1 through 13, is to run concurrently with the sentence imposed on the indictment upon which the dft. was convicted in the Northern District of Illinois. Dft. is to receive credit for time served in connection with the Northern District of Illinois sentence & dft. is to receive credit with respect to this indictment for time served since May 26, 1976, the date on which he was remanded following the jury's verdict of guilty with respect to this indictment.....The court orders commitment to the custody of the Atty. Gen. & recommends that dft. not be confined in Danbury Correctional Facility.....Pierce J. Issued Copy of Commitment 8-26-76.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

-v- :

INDICTMENT

MICHAEL S. GARDNER (also known as S. :
Michael Gardner and as S.M. Gardner), :

76 Cr. 21
(superseding
75 Cr. 741)

SUSAN M. BRAUNIG (also known as Mrs. :
Susan M. Gardner and as S.M. Gardner), :
and :

SY YOAKUM GUTHRIE III, :

Defendants. :

COUNTS ONE THROUGH THIRTEEN

INTRODUCTION

The Grand Jury charges:

From in and around December, 1973 up to and including the date of the filing of this Indictment, in the Southern District of New York and elsewhere, MICHAEL S. GARDNER (also known as S. Michael Gardner and as S.M. Gardner, and hereinafter called "GARDNER") and SUSAN M. BRAUNIG (also known as Mrs. Susan M. Gardner and as S.M. Gardner, and hereinafter called "BRAUNIG"), defendants, together with SY YOAKUM GUTHRIE III (hereinafter called "GUTHRIE"), defendant in Counts 7 through 12 and 14 of this Indictment, also together with others known and unknown to the Grand Jury (hereinafter called "confederates"), unlawfully, wilfully and knowingly did devise and intend to devise schemes and artifices to defraud and to obtain money and property from victims such as Arthur White and White Holdings Ltd. (Counts 1 and 4), L. Ross Allen and Forklean Farms Ltd. (Counts 2, 3 and 4), Barclay's Bank of New York (Counts 5 and 6), Fun

Tyme Packages Inc. (Counts 7 and 8), Myrtle Rupe (Counts 9, 10, 11 and 12), and retail stores, banks, and other commercial enterprises (Count 13) by means of false and fraudulent pretenses, representations and promises in the form of "advance fee" schemes and related schemes also involving false and fictitious names and titles and false, forged and spurious checks, instruments, and obligations.

(A) It was part and pattern of the advance fee schemes and artifices to defraud that:

GUTHRIE and other confederates would bring victims, in the form of persons and businesses in need of rapid and substantial financial assistance, to GARDNER, who would be introduced as an international financial consultant having ready access to large-scale financing from major foreign and domestic sources. GARDNER, purporting to act as the "agent" of undisclosed principals or in the name of companies such as Ekab Investments Inc. and Penquin Products Company (which were actually mere shells), would promise to obtain rapidly for the victims major loans, letters of credit, permanent refinancing, or other forms of financial assistance from, through, or by means of major insurance companies, Swiss banks, Canadian, German and Panamanian corporations, European exchanges, and such entities. In return for such financial assistance, which the defendants and their confederates repeatedly assured the victims

would be immediately forthcoming, the victims were required to make certain payments, of which thousands of dollars were required to be paid in advance. These advance fees, ranging from \$5,000 to \$25,000 and more, were required to be paid to GARDNER in the form of certified checks or other readily negotiable instruments.

GARDNER, BRAUNIG, GUTHRIE and their confederates had no honest expectation that the promised financial assistance would or could be obtained and had neither the capacity nor the intention to obtain it. Rather, the advance fees were immediately cashed or deposited into various personal bank accounts, including accounts opened by BRAUNIG falsely posing as GARDNER's wife, and the proceeds were then immediately spent on primarily personal uses, including payments secretly funneled by GARDNER to the benefit of GUTHRIE and other confederates as their shares of the proceeds of the fraudulent schemes.

Thereafter, GARDNER, BRAUNIG, GUTHRIE, and their confederates, having spent the advance fees, put off the demands of the victims by avoiding meeting or talking with them whenever possible, by claiming that there had been unavoidable or unforeseeable delays or that further monies were needed to meet unforeseen expenses, and by employing

other such ruses to cover their fraud. In the end, GARDNER, BRAUNIG, GUTHRIE, and their confederates never delivered any of the promised financial assistance and never returned any of the advance fees, but claimed instead that the deals had broken down because of some non-compliance, misrepresentation or failing on the part of the victims or of third parties that also precluded any repayment of the advance fees.

As GARDNER, BRAUNIG, GUTHRIE and their confederates well knew, their aforesaid pretenses, representations, and promises were false and fraudulent confidence schemes intentionally designed to defraud the victims of their advance fees and to conceal the fraud.

(B) It was part and pattern of the related schemes and artifices to defraud involving false, forged and spurious checks, instruments and obligations that:

GARDNER and BRAUNIG, with the aid of their confederates, would open accounts in both individual and corporate names (such as the fictitious name S.M. Gardner and the fraudulent enterprise Ekalb Investments, Inc.) at the Metropolitan Trust Company in Canada and the Barclay's Bank of New York, and would acquire blank checks, instruments, and obligations (collectively referred to as "instruments") of said

institutions and gain access to their services and facilities, which they would use for the commission of frauds upon said institutions.

Among other frauds, GARDNER would falsely and fraudulently complete the front sides of instruments of the Metropolitan Trust Company, using false, fictitious, forged and spurious account numbers, account names, and signatures, and making said instruments payable to the defendant BRAUNIG, who would then endorse these instruments on their backs and deposit them into an account in her own name at Barclay's Bank of New York. Thereafter, BRAUNIG, taking advantage of the extended delay foreseeable in the use of the international mails by Barclay's Bank and its agents in the clearing and collection of these instruments, would fraudulently urge Barclay's Bank to credit her account with the face amounts of said instruments and would withdraw these amounts from her account prior to the time that Barclay's Bank learned that these instruments were false and spurious.

(C) It was part and pattern of the related schemes and artifices to defraud involving false and fictitious names and titles that:

MICHAEL S. GARDNER having assumed the name of "S. Michael Gardner," SUSAN M. BRAUNIG would falsely and fraudulently assume the name of "Susan M. Gardner", and both would fraudulently assume the name of "S.M. Gardner." Further, GARDNER would falsely pose as an international financial consultant having ready access to large-scale financing, and BRAUNIG would falsely and fraudulently pose as GARDNER's wife, secretary, administrative assistant, business partner, and the like, as the occasion demanded, and would assume falsely and fraudulently such titles as "Mrs.", "Office Manager," "Administrative Assistant to President," and the like. By the use and with the aid of these assumed names and titles and the illusion of substance and respectability thereby created, GARDNER and BRAUNIG not only conducted, promoted, and carried on the advance fees schemes and false instrument schemes hereinabove described but also fraudulently arranged for the extension of credit from retail stores, banks, and other commercial enterprises, for the purpose of defrauding them and of conducting other unlawful business.

COUNTS ONE THROUGH FOUR

The Grand Jury further charges:

On or about the dates set forth below, in the Southern District of New York and elsewhere, defendants GARDNER and BRAUNIG, together with other confederates, unlawfully, wilfully, knowingly, and for the purpose of executing and attempting to execute the schemes and artifices set forth in the INTRODUCTION to this Indictment, in particular, the advance fee schemes relating to Arthur White, White Holdings Ltd., L. Ross Allen and Porklean Farms Ltd., did (a) cause certain matter to be placed in post offices and authorized depositories for mail matter, to be sent and delivered by the Postal Service and to be delivered according to the directions thereon, in violation of Title 18, United States Code, Sections 1341 and 2; (b) cause to be transmitted by means of wire and radio communication in foreign commerce certain writings, signs, signals, pictures and sounds, in violation of Title 18, United States Code, Sections 1343 and 2; and (c) transport and cause to be transported in foreign commerce securities and money of the value of \$5,000 or more, knowing the same to have been taken by fraud, in violation of Title 18, United States Code, Sections 2314 and 2; all as more particularly set forth below:

<u>COUNT</u>	<u>APPROXIMATE DATE</u>	<u>MATTER IN MAIL OR IN COMMERCE</u>	<u>TITLE 18, UNITED STATES CODE, SECTIONS</u>
1	February 18- 19, 1974	\$25,000 cert tied check from Arthur White transported by GARDNER from Niagara Falls, Ontario, Canada to New York, New York, U.S.A. and there cashed	2314 and 2

- | | | | |
|---|-----------------------|--|------------|
| 2 | March 7, 1974 | Letter from Penquin Products Company, 475 Fifth Avenue, New York, N.Y. to Ross Allen, 8 Church Street, St. Catharines, Ontario, Canada, typed by BRAUNIG and signed by GARDNER | 1341 and 2 |
| 3 | April 1, 1974 | Telephone call from GARDNER in New York, N.Y. to Ross Allen in St. Catharines, Ontario, Canada, asking Allen to send GARDNER \$5,000 immediately, which Allen did | 1343 and 2 |
| 4 | March-April-May, 1974 | Numerous telephone conversations between Ross Allen in Canada and BRAUNIG and GARDNER in New York, N.Y. | 1343 and 2 |

COUNTS FIVE AND SIX

The Grand Jury further charges:

In and around December, 1974, in the Southern District of New York and elsewhere, defendants GARDNER and BRAUNIG, together with other confederates, unlawfully, willfully, knowingly, and for the purpose of executing and attempting to execute the schemes and artifices set forth in the INTRODUCTION to this Indictment, in particular, the defrauding of Barclay's Bank of New York by means of false, forged and spurious checks, instruments and obligations, did cause certain matter to be placed in post offices and authorized depositories for mail matter, to be sent and delivered by the Postal Service and to be delivered according to the directions thereon, in violation of Title 18, United States Code, Sections 1341 and 2, to wit, they did cause Barclay's Bank of New York and its agents to send through the mail for clearance and collection the two fraudulent instruments of the tenor set forth on the following page of this Indictment, which mailings are respectively Count Five and Count Six of this Indictment.

(Title 18, United States Code, Sections 1341 and 2.)

[COPIED FROM]

A 15 Indictment

METRO TRUST
pay to the order of SUSAN M. BRAUNIG
NEW YORK
date DEC 3 1974
amount \$ 4875.00
Four thousand Eight Hundred Seventy Five and 00/100 dollars
The Metropolitan Trust Company
353 Bay Street, Toronto 1, Ontario
U.S. Funds
John Robert Braung
- 2 61002 0002 00003 95 - #0000487500

Susan M. Braung
JAN 10 1975
CANADIAN INTERNATIONAL BANK OF COMMERCE
TORONTO, ONT.
700248

(Title 18, United States Code, Sections 1341 and 2.)

[COUNT Six]

U.S. Funds
METRO TRUST
pay to the order of Susan M. Braung
NEW YORK
date Dec 4, 1974
amount \$ 4931.09
Fourty nine hundred thirty one and 09/100
The Metropolitan Trust Company
4861 Van Horne Avenue
Van Horne Shopping Centre
Montreal 252, Que.
Donald P. Braung
- 2 90001 0002 00002 99 - #0000493109

Susan M. Braung
DEC 10 1974
B. B. N. Y.
PAY TO THE ORDER OF
ANY BANK, BANKER OR TRUST CO.
FOR DEPOSIT
CREDIT TO ACCOUNT
NEW YORK, N.Y.
NEW YORK, N.Y.
NEW YORK, N.Y.

(Title 18, United States Code, Sections 1341 and 2.)

BEST COPY AVAILABLE

COUNTS SEVEN AND EIGHT

The Grand Jury further charges:

On or about the dates set forth below, in the Southern District of New York and elsewhere, defendants GARDNER, BRAUNIG and GUTHRIE, together with other confederates, unlawfully, wilfully, knowingly and for the purpose of executing and attempting to execute the schemes and artifices set forth in the INTRODUCTION to this Indictment, in particular the advance fee scheme relating to Fun Tyme Packages Inc., did (a) cause certain matter to be placed in post offices and authorized depositories for mail matter, to be sent and delivered by the Postal Service and to be delivered according to the directions thereon, in violation of Title 18, United States Code, Sections 1341 and 2; and (b) cause to be transmitted by means of wire and radio communication in interstate and foreign commerce certain writings, signs, signals, pictures and sounds, in violation of Title 18, United States Code, Sections 1343 and 2; all as more particularly set forth below:

<u>COUNT</u>	<u>APPROXIMATE DATE</u>	<u>MATTER IN MAIL OR COMMERCE</u>	<u>TITLE 18, UNITED STAT. CODE, SECTIONS</u>
7	January 29, 1975	Letter from GARDNER addressed to Mr. Mark B. Parker, Attorney at Law, P.O. Box 47, Mineola, N.Y. 11501, bearing the postmark New York, N.Y. 10017 (indicating a postal zone in Manhattan) and stating that letters of credit had been issued to Fun Tyme Packages, Inc.	1341 and 2
8	February 7, 1975	Cable from M. Vigevani, Banque Fiduciaire, Geneva, Switzerland to Bank of New York, New York, N.Y.	1343 and 2

COUNTS NINE THROUGH TWELVE

The Grand Jury further charges:

On or about the dates set forth below, in the Southern District of New York and elsewhere, defendants GARDNER, BRAUNIG and GUTHRIE, together with other confederates, unlawfully, wilfully, knowingly and for the purpose of executing and attempting to execute the schemes and artifices set forth in the INTRODUCTION to this Indictment, in particular the advance fee scheme relating to Myrtle Rupe, did (a) cause to be transmitted by means of wire and radio communication in interstate and foreign commerce certain writings, signs, signals, pictures and sounds, in violation of Title 18, United States Code, Sections 1343 and 2; and (b) induce a person to travel in and to be transported in interstate commerce in the execution and concealment of schemes and artifices to defraud that person of money and property having a value of \$5,000 or more, in violation of Title 18, United States Code, Sections 2314 and 2; all as more particularly set forth below:

<u>COUNT</u>	<u>APPROXIMATE DATE</u>	<u>MATTER OR PERSON COMMERCE</u>	<u>TITLE 18, UNITED STATES CODE, SECTIONS</u>
9	February 14, 1975	Telephone conversation between GARDNER in New York, N.Y. and Myrtle Rupe, in Oklahoma City, Oklahoma, arranging for Rupe to meet GARDNER in New York	1343 and 2
10	February 17, 1975	Travel by Myrtle Rupe from Oklahoma City, Oklahoma to New York, N.Y.	2314 and 2

- 11 March 12, 1975 Telephone conversation 1343 and 2
between GUTHRIE in New
York, N.Y. and Myrtle
Rupe in Oklahoma City,
Oklahoma
- 12 April 4, 1975 Telephone conversation 1343 and 2
between GARDNER in New
York, N.Y. and Myrtle
Rupe in Oklahoma City,
Oklahoma

COUNT THIRTEEN

The Grand Jury further charges:

From in and around 1973 up to and including the date of the filing of this Indictment, in the Southern District of New York and elsewhere, defendants BRAUNIG and GARDNER unlawfully, wilfully, knowingly and for the purpose of conducting, promoting and carrying on by means of the Postal Service the schemes and artifices set forth in the INTRODUCTION and the preceding Counts of this Indictment and other unlawful business, including the defrauding of retail stores, banks, and other commercial enterprises, did use, assume, request to be addressed by, and aid and abet each other in the fraudulent use of, certain fictitious, false, and assumed names and titles other than their own proper names and titles; in particular, MICHAEL S. GARDNER having assumed the name of "S. Michael Gardner," SUSAN M. BRAUNIG assumed such names and titles as "Susan M. Gardner," "Mrs. Susan M. Gardner," "Mrs. S. Michael Gardner," and the like, and both then assumed the name of "S. M. Gardner," and under these names and titles did send matter through the mails and did take and receive mail matter addressed to these fictitious, false and assumed names and titles.

(Title 18, United States Code, Sections 1342 and 2.)

/s/ Joseph P. McMoran
FOREMAN

/s/ Thomas J. Cahill
THOMAS J. CAHILL
United States Attorney

4 d

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 19

UNITED STATES OF AMERICA,

-v-

MICHAEL GARDNER, et al.

Defendants. :
-----x

ORDER

The Government has moved for an order requiring defendants Michael S. Gardner and Susan M. Braunig to appear and furnish certain handwriting exemplars to agents of the Federal Bureau of Investigation. The defendants oppose the motion.

The Government's right to take handwriting exemplars is clear. However, in this case it has already done so. Both defendants furnished handwriting samples during the time of the grand jury proceedings, Braunig on two separate occasions. In addition, the Government has in its possession many other samples of the defendants' handwriting. This is not to say that the Government may not be entitled to receive further exemplars. However, because of the potential for harrassment and abuse which could result from repeated requests of this type, it is this Court's view that the Government should be required to make some showing of the necessity for taking further exemplars beyond the statement that the FBI experts believe "they may be able to make further useful comparisons" if more samples are available. In the absence of such a showing, the Government's request for further handwriting exemplars is denied.

SO ORDERED.

Dated: New York, New York
March 1, 1976

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MAR 3 1976

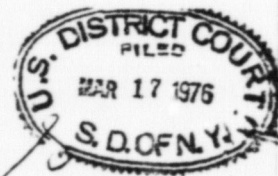


U.S.D.J.

(18)

JSR:dl

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA,

- v -

MICHAEL S. GARDNER (also known as
S. Michael Gardner and as S.M.
Gardner),
SUSAN M. BRAUNIC, (also known as
Mrs. Susan M. Gardner and as
S.M. Gardner), and
SY YOAKUM GUTHRIE, III,

Defendants.

ORDER

A 20

76 Cr. 21 (LWP)

WHEREAS, the United States of America, by motion filed February 6, 1976, has applied to this Court for an order requiring the defendant Gardner to furnish such handwriting exemplars as required for further handwriting comparisons by the handwriting laboratory of the Federal Bureau of Investigation; and

WHEREAS, following the receipt of papers from the defendant Gardner in opposition to said motion, the filing of a memorandum order by this Court on March 1, 1976, and the filing of further papers in support of the motion by the Government, a hearing upon this motion was held before this Court on March 10, 1976, at which counsel for both the Government and defendant Gardner were present and presented argument; and

WHEREAS, after hearing said argument, this Court ordered that the defendant Gardner was to furnish said exemplars no later than March 15, 1976; and

WHEREAS, this Court has been informed by the Government that, as of the close of business on March 15, 1976, the defendant Gardner had failed to comply with said order;

and

the Court has considered an affidavit submitted by the defendant Gardner with respect to
WHEREAS, ^{no} good reason has been presented to this Court why the defendant Gardner should not comply with said order; *with and find*

NOW, THEREFORE, it is hereby ordered that the defendant Gardner furnish, forthwith, to Special Agent Thomas Myers of the Federal Bureau of Investigation and in the presence of Gardner's counsel, such handwriting exemplars as required by the Government, upon pain of being held in

contempt, and being liable for punishment, if such order is

before the def. Gardner is removed from the Metropolitan Correctional Center, but in no event, later than 5:00 P.M., March 17, 1976.
not complied with by 5:00 P.M. today, March 16, 1976.

Dated: New York, New York

March 16, 1976

Lawrence W. Pierce

LAWRENCE W. PIERCE
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA :
-against- :
MICHAEL GARDNER, et al., : '6 Cr. 21
Defendants. :
-----x

ENDORSEMENT ORDER

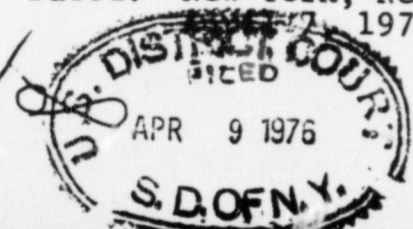
The Government's request for an order, pursuant to Rule 16(b), Fed. R. Crim. P., requiring each of the defendants to permit certain discovery is hereby granted as requested.

The defendants are to comply no later than April 12, 1976.

The argument of certain of the defendants that such discovery by the Government violates the Fifth Amendment rights of the defendants is rejected. See United States v. Estramera, No. 75-1261 (2d Cir. February 2, 1976). Cf. Williams v. Florida, 399 U.S. 78 (1970).

SO ORDERED.

Dated: New York, New York
APR 9 1976



W. L. ...
U.S.D.J.

76 Cr. 21, UNITED STATES v. GARDNER, et al.

ENDORSEMENT ORDER

Relying on United States v. Maze, 414 U.S. 395 (1974), the defendant Gardner has moved to dismiss counts 5 and 6 of the indictment which charge both Gardner and his co-defendant Braunig with mail fraud in violation of 18 U.S.C. §1341. The Court notes at the outset that this motion is addressed to the charges as set forth in the indictment and not, of course, to the sufficiency of any evidence to be adduced at trial.

Counts 5 and 6 of the indictment charge the defendant Gardner with participation in a scheme to defraud the Barclay's Bank of New York (Barclay's) by depositing in various accounts there fraudulent instruments drawn on the Metropolitan Trust Company in Canada. It is alleged that the defendants relied on the fact that Barclay's would use the mails in clearing and collecting these instruments, that is, in sending them to Canada for collection, and that there would be a delay occasioned by this use of the mails. The indictment charges that the defendants took advantage of this delay to obtain funds from Barclay's based on the fraudulent instruments, before Barclay's learned of the true nature of the instruments.

As set forth in the indictment, the scheme charged was not one in which the fraud was complete or had come to fruition before the alleged mailing of the checks by Barclay's took place. See United States v. Maze, *supra*; Parr v. United States, 363 U.S. 370 (1960); Kann v. United States, 323 U.S. 88 (1944). Nor is the defendant's reliance on the delay that would be occasioned by Barclay's use of the mails alleged to have been solely for the purpose of avoiding or delaying detection so as to enable him to engage in further similar ventures. See United States v. Maze, *supra*.

Rather, the indictment charges that the scheme specifically contemplated both the bank's use of the mails and the resulting delay as factors which would aid in the

76 Cr. 21 (cont.)

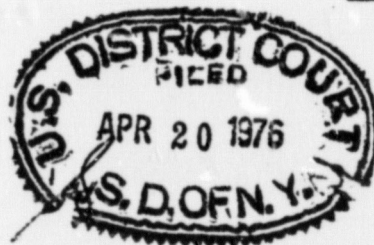
accomplishment of the objects of the scheme. Under the circumstances, the indictment has clearly charged that the use of the mails was "one step toward the receipt of the fruits of the fraud." Kann v. United States, supra at 94. Post-Maze decisions have held precisely such a use of the mails to satisfy the jurisdictional requirements of §1341. See United States v. Ferguson, No. 75-1629 (6th Cir. February 10, 1976); United States v. Shephard, 511 F.2d 119 (5th Cir. 1975). See also United States v. Marando, 504 F.2d 126 (2d Cir.), cert. denied, 419 U.S. 1000 (1974); United States v. Constant, 501 F.2d 1284 (5th Cir. 1974), cert. denied, 420 U.S. 910 (1975); United States v. Miles, 498 F.2d 394 (8th Cir.), cert. denied, 419 U.S. 1021 (1974).

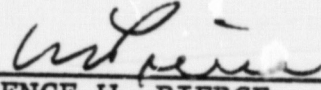
It remains to be seen, of course, whether the Government's proof will establish the charges as set forth in counts 5 and 6 of the indictment. The Court rules at this time only that those counts are sufficient to set out a violation of 18 U.S.C. §1341.

The defendant Gardner's motion to dismiss counts 5 and 6 is hereby denied.

SO ORDERED.

Dated: New York, New York
April 19, 1976





LAWRENCE W. PIERCE
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA :

- v - :

76 Cr. 21

MICHAEL GARDNER, et al., :

Defendants. :
-----X

MEMORANDUM AND ORDER

Defendant Michael Gardner (Gardner) has moved the Court for an order, pursuant to Rule 15, Fed.R.Cr.P., permitting the taking of a deposition of Susan M. Braunig (Braunig), a co-defendant in this case. Braunig has been arrested and incarcerated in Montreal, Canada and, as far as the Court has been informed at this point, will not be available for the trial of this action, scheduled to commence on April 26, 1976.

The Second Circuit has stated that "a motion made under Rule 15 is addressed to the discretion of the trial court (citation omitted); that is, is to be granted only in 'exceptional situations,' (citation omitted); and that the moving party has the burden of demonstrating the availability of the proposed witnesses and their willingness to

appear (citation omitted), the materiality of the testimony which it is expected they will give, (citation omitted) and that injustice will result if the motion is denied, (citation omitted). It is within the discretion of the trial court to deny/motion if it is made after 'unexcused delay,' (citation omitted), of on the 'eve of trial,' (citation omitted)." United States v. Whiting, 308 F.2d 537, 541 (2d Cir. 1962).

While the instant motion was unquestionably made on the "eve of trial," the Court does not find it to have been made after "unexcused delay." The Court and counsel were informed by the government by means of a letter dated April 12, 1976 that it was unlikely that Braunig would be produced for trial. Gardner's motion was made within a day or two of the date of that letter. Under the circumstances, the Court finds the motion timely.

The affirmation of counsel in support of the motion, together with the statements by counsel for Gardner and for Braunig at a pre-trial conference in this matter held on April 19, 1976, also establish that the burden on the moving party resulting from requirements set forth supra has been met. Since Braunig is incarcerated in Montreal her physical availability is not in doubt. The

government has confirmed to the Court the willingness of the Canadian authorities to permit her deposition. Both her counsel and counsel for Gardner have stated that she had previously expressed a willingness and an intention of testifying on behalf of Gardner and herself at trial. Counsel for Braunig has expressed his view that Braunig would give deposition testimony should this be made possible. Thus, a preliminary showing of the witness' willingness to testify has been made. In this regard, the Court also requests Gardner's counsel to obtain from Braunig a written statement setting forth her willingness to submit to examination and cross-examination concerning matters relevant to this case.

Counsel for Gardner has stated that Braunig was to have been the principal witness for Gardner's defense. He states that she will be asked to testify as to many of the transactions with respect to which she and Gardner have been charged in the instant indictment and that she will be used to introduce numerous documents into evidence. It is further asserted that she would testify as to the intent of the defendants in engaging in particular transactions which are the subject of the indictment herein. The materiality of such testimony is

apparent to the Court. Furthermore, since such testimony might well not be available to the defendant from any other source (other than perhaps by defendant taking the stand himself--which he may or may not choose to do), the Court finds that the defendant Gardner has shown that injustice will result if Braunig is not available as a witness at trial and Gardner is not afforded an opportunity to take her deposition.

The fact that Braunig is presently in a foreign jurisdiction is no bar to the granting of the relief sought in this motion. See, e.g., United States v. Largan, 330 F.Supp. 296 (S.D.N.Y. 1971). The Court does find, however, that certain special procedures are called for in connection with the proposed deposition. The grant of the relief sought is hereby made contingent on compliance with the "ground rules" set forth below:

1. Except insofar as shall be specifically authorized by the Court, no delay in the trial of this action will be permitted for the purpose of taking the Braunig deposition.
2. The parties shall indicate by stipulation in writing their consent to the appointment by the Court of a magistrate as a Special Master to accompany the parties

to Montreal to swear the witness, and to preside over the taking of the deposition. The magistrate will be requested by the Court to take a liberal stance with respect to the taking of testimony, with final rulings as to its admissibility into evidence at the trial to be made by the Court upon appropriate objections by counsel.

3. The parties shall stipulate in writing, that in the event that Braunig is sworn as a witness by the magistrate at the taking of the deposition, such swearing shall be deemed sufficient by the parties for the purposes of Rule 603, FRE and the parties shall waive any objection under Rule 603 to the admissibility of any of Braunig's deposition testimony.

4. Such waivers, if any, as are necessary shall be secured from defendants Gardner and Sy Yoakum Guthrie (Guthrie) pursuant to Rule 15(b), Fed.R.Cr.P., before any travel is undertaken by attorneys with respect to this matter and before any testimony is taken.

5. The use at trial of the deposition testimony taken shall be governed by Rule 15(e), Fed.R.Cr.P., and the Court's rulings with respect to its use shall be made at such times as testimony is offered by any party.

6. Pursuant to the request of the government and upon the advice of the government that the appropriate Canadian authorities have no objection to such a procedure, the deposition shall be recorded on video-tape. However, unless otherwise ordered by the Court, neither the taking of the deposition nor the trial of this action shall be delayed solely because of technical or other problems arising with respect to the use of video-tape.

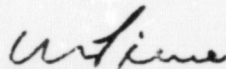
7. Pursuant to Rule 15(c), Fed.R.Cr.P., and the provisions of the Criminal Justice Act, the necessary and reasonable expenses of counsel for Gardner, Guthrie, and Braunig incurred in traveling to and attending the Braunig deposition and the expenses of taking the deposition itself shall be paid by the government.

8. The deposition shall commence on Sunday, May 2, 1976, subject to the necessary arrangements with the Canadian authorities or as soon thereafter as is possible, and shall continue until completed. However, any extension of the deposition which shall occasion a continuance of the trial to a date beyond ^{10:00 AM} Tuesday, May 4, 1976, is apt to be looked upon with disfavor by the Court and must be specifically approved by the Court before being undertaken.

In accordance with the conditions and specifications set forth in this opinion, the defendant Gardner's motion to be permitted to take the deposition of Braunig is hereby granted.

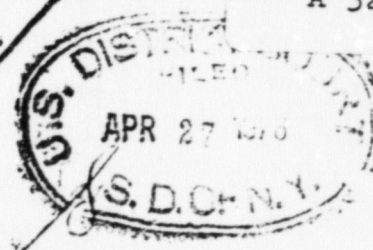
SO ORDERED.

Dated: New York, New York
April 21, 1976



LAWRENCE W. PIERCE
U. S. D. J.

76 Cr. 21, UNITED STATES v. GARDNER, et al.



ENDORSEMENT ORDER

By the motion within the defendant Michael Gardner (Gardner) has moved to dismiss the indictment in this case because of the Government's alleged failure to comply with this District's Plan for Prompt Disposition of Criminal Cases, and because of alleged prosecutorial misconduct.

Speedy Trial. The defendant Gardner claims that the Government was not ready for trial in this case in compliance with the District's "six-months" rule. As in all such cases, the chronology of events is of the utmost importance. United States v. Flores, 501 F.2d 1356, 1358 (2d Cir. 1974).

Gardner was arrested on May 16, 1975 and an indictment, 75 Cr. 475, was filed against him on that date. On July 25, 1975, a superseding indictment, 75 Cr. 741, was filed naming two co-defendants along with Gardner. On August 11, 1975, the Government filed its notice of readiness, well within six months of the date of Gardner's arrest.

At a pre-trial conference on August 12, 1975, the Court set this case for trial on January 8, 1976. At a further conference on September 30, 1975, the trial was rescheduled to January 29, 1976 because of conflicts in the Court's schedule and a conflict on the part of counsel for Sy Yoakum Guthrie, one of Gardner's co-defendants.

On January 9, 1976, the Government filed a further superseding indictment, 76 Cr. 21. At no time had the Government requested an adjournment of the trial for the purpose of filing the superseding indictment. Compare United States v. Rodriguez, No. 493 (2d Cir. January 5, 1976). Thereafter, by notice of motion dated January 15, 1976 and filed January 21, 1976, the defendant Gardner moved to dismiss the indictment on the grounds previously stated.^{1/}

^{1/} After the motion was made, at a conference on January 22, 1976, the Court adjourned the trial of this action to April 1, 1976. This adjournment was the result of an application by the Government for a one week adjournment

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APR 27 1976

76 Cr. 21 (cont.)

Gardner asserts that Counts 5 and 6 of Indictment 76 Cr. 21 contain new charges, that the Government has never filed a notice of readiness with respect to these charges, and that since the indictment with respect to these charges was filed more than six months after Gardner was arrested the Government was not ready for trial within the time required and these counts must be dismissed.^{2/}

The Government asserts that if Counts 5 and 6 constitute new charges a new six month period began to run from the date of the superseding indictment. Whether this would be so where the Government has announced its readiness for trial, trial has not been reached, but through no delay caused by the Government, and new charges are brought more than six months after the defendant was arrested, is a question which the Court need not reach in the context of this motion. Examination of Counts 12 through 17 of Indictment 76 Cr. 741 and Counts 5 and 6 of Indictment 76 Cr. 21 reveals that while the statutes claimed to be violated are different, Count 5 and 6 of the superseder charge the defendant with violation of federal law based on the same transactions involving the same checks which were set forth in Counts 12 through 17 of the previous indictment. The Court does not find that such a recasting of the alleged offenses in terms of a different statute constitutes the assertion of new charges as alleged by Gardner.

^{1/} (continued)

due to the illness of a prosecution witness. The Court adjourned the trial to the first available date in the Court's calendar with the consent of all counsel. This final adjournment is not at issue on the instant motion.

^{2/} The motion speaks to the entire indictment. However, since all counts charging Gardner other than Counts 5 and 6 are virtually identical in wording to counts in the earlier indictment and are not even claimed by Gardner to contain new charges, the Court interprets the motion as being addressed only to Counts 5 and 6. To whatever extent the motion is addressed to the other counts of the indictment, there is no basis whatever for the relief sought and the motion is denied.

76 Cr. 21 (cont.)

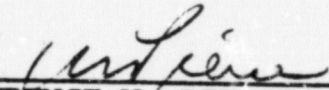
As for Gardner's claim that, in any event, the Government has never filed a notice of readiness with respect to Indictment 76 Cr. 21, the Court notes that should a new notice be required as to a superseding indictment, the Government has regularly expressed its readiness for trial at conferences before the Court with regard to this matter.

Prosecutorial misconduct. Gardner's motion to dismiss on the ground of prosecutorial misconduct is unsupported by any sworn factual allegations based on personal knowledge or otherwise. The motion presents no factual or legal basis for granting the relief sought.

The motion to dismiss, both on the ground of failure to comply with the "six-month" rule and the ground of prosecutorial misconduct is hereby denied.

SO ORDERED.

Dated: New York, New York
April 26, 1976



LAWRENCE W. PIERCE
U. S. D. J.

1 gwa Rupe-direct 1781

2 MR. FISCHER: I would renew, your Honor,
3 my request for such a hearing.

4 THE COURT: Mr. Fischer has submitted
5 to the Court three sworn statements from persons in-
6 carcerated with Mr. Gardner at the Metropolitan Correc-
7 tional Center and also a letter from Mr. Gardner's
8 wife, all addressed to the issue of Mr. Gardner's competency
9 to stand trial. In addition, the Court has received
10 a report from Dr. Caffrey, chief of psychological
11 services at the MCC, and that report concerns Mr. Gardner's
12 condition.

13 The issue before the Court is whether or
14 not these submissions taken with other information
15 available to the Court constitute such reasonable grounds
16 to believe that Mr. Gardner may be incompetent,
17 that is, unable to understand the proceedings against
18 him and unable to assist in his own defense, that a
19 psychological examination is warranted and a further
20 hearing on the matter, or at least a hearing on the
21 matter.

22 In making this determination, the Court
23 distinguishes, as it has before, between the question
24 of whether Mr. Gardner is suffering from depression
25 and whether he is competent to stand trial as defined
in the relevant statute.

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Rupe-direct

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I have examined all the materials. I find that they would support a finding that Mr. Gardner is suffering from a depression of some degree, and perhaps a serious degree. I do not find anything contained in these letters and reports which creates in the Court's view a reasonable ground for believing that Mr. Gardner does not understand the nature of these proceedings or that he is unable to assist in his own defense. To this I would add that I have had a chance to observe Mr. Gardner throughout the course of this trial, which is now into its third week. I have noted that he has conferred with counsel consistently and regularly, daily, hourly, and he has assisted in locating documents which were relevant at different times to the testimony being given, and has shown every sign of understanding fully what is going on here, both in general terms and as to specific matters as they arise. It is difficult for me to envision a more apparent demonstration of understanding of proceedings than what I have observed from the time that this trial began, including the impanelling of the jury. Accordingly, his application for a competency hearing is denied.

We will file that, docket it.

MR. FISCHER: May I note my exceptions?

THE COURT: Mark it as a Court's exhibit.

76 Cr. 21, UNITED STATES OF AMERICA v. MICHAEL S. GARDNERENDORSEMENT ORDER

The defendant Michael Gardner has moved for an order vacating the judgment of conviction and for a directed verdict pursuant to Rule 29, Fed.R.Cr.P.

To the extent that the defendant's motion is based on the admission at trial of certain evidence to which defense counsel objected at the time of its admission, the Court adheres to its trial rulings. To the extent that the material was not objected to at trial, the defendant may have waived his right to object at this time. In any event, in the total context of the trial, the Court is not persuaded that the admission of any of the evidence identified by the defendant in connection with this motion warrants the relief requested.

The other matters raised are also matters about which the Court ruled during the course of the trial and as to which the Court adheres to its previous rulings. One matter does, however, deserve some comment. This is the question of whether the Court's rulings on the defendant Gardner's Rule 17 motion caused the defendant to be unable to produce needed witnesses.

It is this Court's view that the Court extended every opportunity to the defendant to obtain, at government expense, the witnesses listed in his Rule 17 motion, including witnesses who were not subject to the subpoena power of the Court. By an order dated April 30, 1976 and supplemented May 5, 1976, the Court directed that fourteen of the defendant's proposed foreign witnesses be produced at government expense subject only to the condition that the witnesses be willing to attend and testify. By another order dated May 5, 1976, the Court directed that subpoenas be issued at government expense for fourteen of the defendant's proposed witnesses from within the United States. In accordance with earlier oral communications between the Court and defense counsel, the order provided that the waiver of Fifth Amendment rights which was to be required of these witnesses

76 Cr. 21 (cont.)


could be furnished by wire communication. Further, by order dated May 7, 1976, the Court removed the requirement that any waiver be furnished and granted the defendant's motion with respect to these fourteen witnesses.

At no time during the trial did the defendant ever identify a particular witness as being available and willing to testify, but for some requirement imposed by the Court. Nor did the defendant at any time during the trial ever request a continuance so that a witness, otherwise available and willing to testify, could be brought before the Court. Under all of these circumstances, the Court cannot conclude that the defendant Gardner was denied the right to produce any witness by virtue of any order of the Court and the defendant's motion based on that ground is also denied.

The defendant's motion is denied in all respects.

SO ORDERED.

Dated: New York, New York
July 6, 1976



LAWRENCE W. PIERCE
U. S. D. J.



UNITED STATES DEPARTMENT OF JUSTICE
METROPOLITAN CORRECTIONAL CENTER

150 PARK ROW
NEW YORK, N. Y. 10007

May 6, 1976

Honorable Lawrence W. Pierce
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

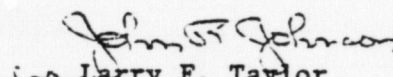
Dear Judge Pierce:

Attached is a copy of the psychological evaluation prepared by Dr. Caffrey of our staff on Michael Gardner.

You'll note that Dr. Caffrey's report concludes that Mr. Gardner has some serious mental health problems which may require treatment.

After reading Dr. Caffrey's report, if you have any questions, please feel free to contact us. We are happy to provide you with this information and hope you will feel free to contact us if any further information is needed.

Sincerely,


Larry F. Taylor
Warden

Attachment



UNITED STATES DEPARTMENT OF JUSTICE
METROPOLITAN CORRECTIONAL CENTER

150 PARK ROW
NEW YORK, N. Y. 10007

May 6, 1976

Honorable Lawrence W. Pierce
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Dear Judge Pierce:

I am writing in response to your request to Warden Larry Taylor of last week that I submit a report on Mr. Michael Gardner's current psychological condition. I understand that this report may have some bearing on your decision about the possible need for a competency examination of Mr. Gardner.

I have met with Mr. Gardner seven (7) or eight (8) times during the past three (3) months. I began meeting with him because of a phone call from his wife to our institution. She was concerned about a change that she had observed in him. During our early meetings, Mr. Gardner too was concerned about himself, about the effect that the radical changes in his life may be having on him, and specifically about suicide dreams that were waking him in the middle of the night. In spite of these serious concerns, however, Mr. Gardner maintained an evident composure and self-assurance about himself and about his ability to deal with his difficulties. It was also clear during our early meetings (from January 30th to March 8th) that in spite of the suicidal dreams Mr. Gardner sustained a strong desire to live and to overcome the difficulties he was encountering.

In our most recent meetings, however, and specifically in our meeting today, Mr. Gardner's self-assurance, belief in himself, and desire to continue living have noticeably deteriorated. A confusion and perplexity, both about his court case and about the value of his life, have come to dominate his thinking. Furthermore, a definite fear about what he may in fact do physically to himself has come to the surface: he has moved into a condition that I refer to as "actively suicidal," a status I would attribute to just three (3) or four (4) of our residents at the present time.

Mr. Gardner has valued himself as someone who is a source of support, guidance, and comfort to others. The court's current deliberations about his possible incompetence (represented in part by my interview this afternoon) therefore constitute a further difficulty for him in that it spells a further loss of his stature as someone who supports others. I mention this consideration because it may allay a possible suspicion that Mr. Gardner's current condition is primarily motivated as part of a defense strategy.

I find no indications of organic impairment, deteriorative-type loss of functioning, or schizophrenic-like thought disorder. In my judgment, Mr. Gardner is experiencing a serious depressive-type reaction to a relatively sudden loss of a sense of himself as a valuable person. As mentioned earlier, Mr. Gardner's picture of himself has been based largely on other people's views of him as a giving person. The public nature of his indictments, investigations, and court appearances has therefore made the rapid dissolution of his sense of himself possible.

RECOMMENDATIONS:

1. It is essential that Mr. Gardner receive psychotherapeutic attention (my next appointment with him is May 10th, 1976).
2. I also recommend that the court continue to treat the psychopathological aspects of Mr. Gardner's behavior with the utmost seriousness.

Respectfully submitted,

Thomas A. Caffrey, Ph.D.

Thomas A. Caffrey, Ph.D.
Chief, Psychology Services

April 27, 1976

Judge Pierce
U.S. District Court
New York, New York

Dear Sir:

Michael Sardon and I have been married for fifteen years and have three children, a son and daughter (twins) age fourteen and a younger son who is almost eleven. I am presently a third year doctoral student in the Biopsychology program of the City University of New York. In addition to my being a student, I also teach introductory Psychology at Hunter College. I am writing you now because I am extremely concerned about my husband's mental state. A month or two ago when I went to visit Michael at the Metropolitan Correctional Center, I found him in a very depressed state of mind. He wasn't sleeping or eating, frequently cried, and spoke of suicide. After the visit ended I requested that a psychologist or psychiatrist see him because I was fearful of what he might do to himself without psychological help. I had seen the depression building up but I guess I hadn't wanted to admit to myself that it would become that bad. Michael saw the psychologist and psychiatrist a few times but then became so depressed that he couldn't even get himself to make the effort to go down for his visits with them. Although Michael is able to pull himself together for short periods of time (as is common in depressed people) I don't think he can withstand the additional pressure of standing trial at the time without completely breaking down. The attorney has complained to me that Michael has not organically simple things in preparation for the trial which is certainly not normal for him since in the past he always took an active and interested role in his legal matters.

Thank you for your consideration in this matter.

Sincerely yours

David Sardon

Peter De Nicola
150 Park Row
New York 10007, N.Y.

Just a short note to say that I have been living at M.C.C. since Jan. 14, 76. I was moved from the 722 floor early in March. At that time I was sleeping in a dorm next to Mike Gardner. We spent a lot of time talking and from the first time to now I have seen a change in him. I find myself trying to talk him out of hurting himself. For the past four weeks I am not able to sleep because I'm sure he will try some thing. In the past two weeks I've called his wife to inform her of his condition. As we talk he starts to cry and sits in the corner the rest of the night. Mike tells me to Pray for him and ask God to take his life. He wants me to promise to take care of his wife and children after he is gone. Please Help him.

duly noted this
26th day of April, 1976
R. S. [unclear]

Peter De Nicola

AFFIDAVIT

I, LEWIS MARCUS AN INMATE AT THE
M.C.C. BEING DULY SWORN DEPOSES AND
SAYS,

I HAVE KNOWN MICHAEL GARDNER FOR
AT LEAST 5 YEARS.

I HAVE BEEN WITH HIM ON THE
11TH FLOOR OF M.C.C. FOR APPROX
TWO MONTHS.

HE IS SLEEPING IN THE SAME DORM
AS I AM.

HE HAS TALKED MANY TIMES OF COMMITTING
SUICIDE AND I BELIEVE HE IS CURRENTLY
SO DEPRESSED IF HE HAD A MEANS HE WOULD.

I HAVE SPENT MANY HRS. TRYING TO
LIFT HIS SPIRITS

duly noted this 26th
day of April, 1976.

E. J. [Signature]

Lewis Marcus

Affidavit

I, Wayne T. Eckhart, am an inmate at the Metropolitan Correctional Center and am a friend of Michael Gardner and I make this affidavit of my own free will with the hope that it will help Mike.

I have been incarcerated at the Metropolitan Correctional Center for nearly two (2) months and have become very friendly with Michael Gardner, because he has been helping me with my case. Also we play gin-rummy together for relaxation. For the past two (2) weeks, Mr. Gardner has been very dispondent and has even talked of committing suicide. I have tried to talk him out of doing this and played gin rummy with him to take his mind off of his problems and troubles. He throws the cards in the air, has talked incoherently with tears running down his cheeks. This is not the way of a rational man and I think that he is in need of psychiatric help. I swear that everything in this affidavit is true and will swear to it in a court of law.

Respectfully yours,

Wayne T. Eckhart #02215-158

150 Park Row

New York, N.Y. 10007

Subscribed and sworn to before

me this 26th day of April, 1976

Eckhart

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA

-against-

MICHAEL S. GARDNER,

Defendant.
-----X

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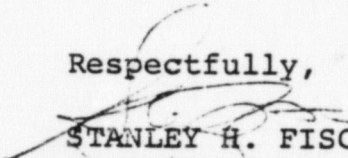
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76 Cr 21 (L & P)

NOTICE OF MOTION

Defendant, MICHAEL S. GARDNER, moves this Court upon the annexed papers, for an Order vacating and setting aside the jury's verdict of Guilty and for a judgment of acquittal and for such other relief as to the Court may seem just and proper.

Respectfully,


STANLEY H. FISCHER
Attorney for Defendant
MICHAEL S. GARDNER

TO: HON. LAWRENCE W. PIERCE

TO: ASSISTANT U. S. ATTORNEY
JED S. RAKOFF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - -X

UNITED STATES OF AMERICA :

-against- :

MICHAEL S. GARDNER, :

Defendant. :

MEMORANDUM

- - - - -X

The defendant respectfully moves this Court for an Order vacating the judgment of conviction after trial and for a directed verdict pursuant to Rule 29 and for such other and further relief as to the Court may seem just and proper.

The basis of this motion is that the conviction was against the weight of the evidence and as a result of deprivation of defendant's rights.

a) The evidence of the within case as to the counts involved insofar as MICHAEL S. GARDNER, was totally insufficient to show that Mr. Gardner, the defendant, was actually involved and culpable to the extent required for conviction and the finding of guilt beyond a reasonable doubt. Significant and substantial extraneous and irrelevant, but prejudicial, evidence was permitted

which far outweighed any probative value to same, for instance:

- 1) Mr. Gardner's prior two convictions;
- 2) Mr. Gardner did not file income tax returns since 1971;
- 3) The allegation that Mr. Gardner was committing marital indiscretions;
- 4) The government's accusation that Mr. Gardner had been stealing money from his mother;
- 5) The government's inference that Mr. Gardner's trip to Europe was a vacation with his wife;
- 6) The government's inference that Mr. Ivanoff was available as a witness to defendant if he wished to prove his story;
- 7) The government's inference that Bingham Silver Lead was a fraud in which Mr. Gardner was involved;
- 8) The government's inference that Mr. Gardner had spoken to another U. S. Attorney in the Southern District, New York, relative to frauds involving Mr. Ivanoff;
- 9) The government's implication on redirect that Mr. Kirby's Canadian indictment was somehow related;

10) The accusation that Mr. Gardner's relationship with Miss Braunig was somehow predicated on her getting a part in a Broadway show;

11) The inference that Luzerne Trust Bank was not a responsible banking institution in Switzerland;

12) The allegation that Mr. Gardner had not completed other business deals;

13) The inference and allegation that Mr. Gardner had some part in the preparation in Mr. Clements' false resume or had knowledge of its falsehood;

14) The inference that Mr. Gardner represented Mr. Clements as a member of the House of Lords;

15) The government's continued inference that there was something sinister about attorneys routinely preparing corporate minutes;

16) The insinuation that Mr. Gardner had forged the name of Lawrence Clements, among others;

17) The use of the Lufthansa civil deposition and the manner in which it was used;

18) Refusal by the Court to permit Mr. Gardner's

acquittals to be introduced to rebut the false impression given to the government that Mr. Gardner was never available and the inference that he had no interest. The government's use of these aforesaid materials over objection by defense counsel, permitted the jury to receive an aura of an evil man, which aura permeated the trial to the extent that the facts concerning each of the legitimate deals were clouded from the jury.

b) Refusal by the Court to permit counsel to refer to the bill of particulars in which the government alleged that Mr. Gardner pocketed the money and which was clearly and convincingly shown to be untrue at the trial, through the government's own evidence.

c) Mr. Gardner's inability to obtain witnesses because of hardships, such as a requirement of a waiver of Fifth Amendment rights.

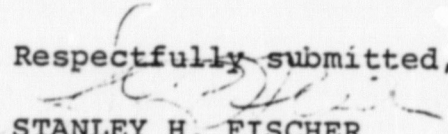
d) The Court's refusal to permit a competency hearing of the defendant, despite the fact that lay individuals and the Chief Psychologist of the Metropolitan Correction Center all recognized mental defect in the defendant.

e) The denial of the defendant to his right to a speedy

trial which occurred as a result of the government's filing superceding indictment after superceding indictment.

WHEREFORE, defendant respectfully moves for the relief sought herein.

Respectfully submitted,


STANLEY H. FISCHER
Attorney for Defendant
Office & P.O. Address
565 Fifth Avenue
New York, New York 10017
(212) 490-1870

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SEP 8 1978
ROBERT B. FISKE JR.
U.S. ATTORNEY
SO. DIST. OF N. Y.